

# Justice and peace in a new Zimbabwe

## Transitional justice options

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### Introduction

The second round of Zimbabwe's presidential election is scheduled for the end of June 2008. There has been a sharp increase in state sponsored violence since the first round in March (ICG May 2008), coming after almost a decade marked by violence, intimidation and impunity for which the state itself has been primarily responsible. One of the principal issues for any future political transition will be whether – and how – to formally and publicly deal with past systematic and widespread human rights abuses. This is moreover a core political issue now, not simply a collateral legal or moral one to be left until later.

Part of the challenge is to map a way between sheer moral and legal principle and mere political pragmatism (Emmanuel 2007). One transitional justice option is to now flag, and then later establish, a truth and reconciliation commission which might give incentives to people at various levels to denounce violence and cooperate in peacebuilding, but which need not rule out criminal prosecutions where appropriate. Against the backdrop of an international legal and normative framework which may shape justice options, the first part of this paper addresses the question 'why a truth commission?' We suggest that Zimbabwe's particular experiences necessitate a national truth commission as a viable or necessary option in providing sure conditions and foundations for a peaceable future. The second part of the paper then addresses some considerations relating to how to establish such a formal process, drawing on others' experience. Of course, the question 'how might a commission look?' is (or should be) inextricably linked with the question 'why have a commission anyway – what exactly is it for?'

Engagement on this topic raises a host of difficult questions: in any interim phase, how will

negotiations on 'transitional justice' persuade the powerful and prosecutable that it is safe to cooperate? Does a 'restorative justice' approach have stronger credentials than the moral claims for criminal accountability and punishment? If there is 'no peace without justice', who gets to decide what constitutes justice? How far back does 'the past' really go: should any commission deal with abuse allegations arising from the 1980s violence in Matabeleland or restrict itself to the period after 2000? What is the legal and political status of various presidential pardons and amnesties? What is the relevance, utility or propriety of calls for international prosecutions? What is the best role for local civil society? Does the international community have a role to play in transitional justice, or should this be wholly 'locally owned'? How would such a process deal – if at all – with any process on land claims or property disputes: can many of the acts of violence be separated from an enquiry into such questions? With an economy in freefall, what priority of resources and national attention should a backward-looking process have? Overall, in going forward (if and when they can), to what extent should Zimbabweans be concerned with looking back?

How will negotiations on 'transitional justice' persuade the powerful that it is safe to cooperate?

The International Crisis Group's view in their most recent report is that while 'Zimbabwe will need a transitional justice mechanism at some stage,' the practical necessities of the immediate crisis (and indeed longer term reconciliation) require that 'guarantees' be given to political leaders and the security forces ('modalities for ensuring military loyalty' and promises of non-retribution) (ICG May 2008:2). This may well be so, and to some extent the subject of the present paper perhaps presupposes a certain quality of 'transition', or relates to matters that lie only on the other side of difficult negotiations, confrontations and compromises immediately ahead.



However, it is clear that these issues will be directly shaping political negotiations *now* in the interim period – questions about what kind of justice strategy can secure the conditions for a transition to take place at all, and then to take place peacefully. The ICG report seems to suggest that justice issues are not of immediate significance. But it is difficult to see how ‘justice’ issues can be separated from ‘political’ issues during this stalemate, since fear of prosecution partly explains hardliners’ resistance: the thrust of the ICG report is indeed an acknowledgment of this fact.

In this light, this paper is intended to stimulate more explicit discussion on transitional justice issues and options. Its contribution is at a certain level of abstraction, since the authors are not privy to ongoing discussions between various players on these issues. However, the fact that events and power balances are presently fluid suggests that this rather more general, thematic and dispassionate approach might be preferable.

### **The context: violence and impunity in Zimbabwe**

The suggestion that a truth commission may be one valuable ingredient in facilitating a sustainable national peace for Zimbabweans proceeds from two related premises:

- That human rights abuses in Zimbabwe’s modern history have been serious, widespread, persistent, deliberate, systemic, and conducted largely with impunity
- That it is both right in principle and prudent for peacebuilding prospects that these issues and events be formally and publicly acknowledged and addressed in a way that arrests the pattern of impunity, enables a measure of justice and affords victims due redress, but that does not threaten the possibility that a legitimate transition may occur without serious resistance and conflict now or at a later date

On the first premise, human rights abuses perpetrated, encouraged or tolerated primarily by the state and its agents since at least February 2000, and which continue to this day, have constituted criminal and civil wrongs and have in any event led to loss, pain, grief, distrust, uncertainty, suspicion, grievance, anger and dislocation (see Raftopoulos 2005). The abuse of human rights and the culture of impunity in Zimbabwe have been fairly well chronicled.<sup>1</sup> Of course, one point about a truth commission is that there is much that is unknown or misunderstood: the state has been hostile to scrutiny for many years.

While formal denials, secrecy and the difficulty of cataloguing cases prevent a full assessment, there is little doubt that the ZANU-PF government has been directly or indirectly responsible for murder, kidnap and disappearances, rape, torture, beatings and other humiliating inhuman or degrading treatment, arbitrary detention, denial of due process rights, group punishment including use of food as a political weapon and selective non-distribution of famine relief, mass displacement and forced removal, and other human rights abuses in violation of Zimbabwean law and falling within well recognised ‘categories’ in international law.

One fundamental issue for any transitional justice strategy confronting human rights abuse is to define what relevantly constitutes ‘the past’:

- There is almost a decade of political violence, intimidation, displacement and destruction beginning roughly with the February 2000 constitutional referendum, rising with the elections of June 2000, and which has continued since, being most marked around elections including the recent March 2008 election and its aftermath. Beginning in October 2000, legal impunity for violators has purportedly been assured through a number of clemency, amnesty and indemnity orders.
- There are the acts of violence, displacement and property loss associated with spontaneous as well as state-sponsored invasions of mainly white-owned commercial farms that began in 2000.
- There are the many human rights abuses associated with Operation Murambatsvina in 2005 which led to the forcible displacement of about 700 000 people (UN 2005).

These three ‘categories’ roughly describe the immediate past in relation to which a truth, justice and reconciliation commission might be constituted.

Of course, state human rights abuses have occurred in earlier periods of Zimbabwe’s history. However, for reasons given below, any future strategy might not attempt to substantially or initially address Rhodesian (pre-1980) or colonial era (pre-1965) abuses. More difficult is the question of whether any formal strategy or mechanism ought to attempt to deal with allegations of grave crimes and massive human rights abuses arising from political violence throughout the 1980s in particular the Zimbabwean army’s *gukurahundi* campaign in the Matabeleland and Midlands provinces in 1983-4. As discussed below, this period in Zimbabwe’s past is arguably

### **What kind of justice strategy can secure the conditions for a transition to take place at all?**



unresolved and 'unprocessed' – neither truth nor justice, reconciliation nor redress has been attempted or obtained – and represents a possible future source of demands and disunity. However, including this period within the initial mandate of a new commission carries the risk, in a still fragile setting, of reopening this ethnic fault-line.

The situation is acutely balanced at present in terms of attempting to ensure justice for past wrongs without imperilling the possibility of a relatively peaceful transition. Members of the security apparatus and militias lack confidence about the consequences of any change in regime, including exposure to prosecutions and retribution. In addition, state institutions for protecting or remedying abuses are weak or directly implicated in past and ongoing violence. Various elements of society may be marginalised, indifferent, unaware, insecure, afraid of discovery, suffering directly, desiring answers, accountability, or simply practical relief. There may also be high levels of denial or inability to know the truth, and especially if there is a change, there may be a desire for self-help retribution and settling of scores, where the truth of the violence is well known, its doers identifiable. The possibility also exists that the legacy of decades-past unresolved violence may rise and manifest. What is to be done?

### **'Transitional justice': some preliminary considerations**

In reaching or embedding a new political dispensation, there exists a range of 'transitional justice options': ways to deliberately and formally deal with any systematic and large scale past human rights abuse (see generally Kritz 1995 and 2002; Lederach 1997; Minow 1998; Teitel 2000; MacAdams 2001; UNSG 2004; CSVR 2008; ICTJ 2008; Wisconsin 2008). Most modern responses to large scale violations tend – mainly for reasons of internal political expediency, with occasional international pressure – to adopt a position somewhere between the two extremes of comprehensive criminal prosecutions on the one hand, and blanket amnesty or collective amnesia on the other. Strategies include selective criminal trials, truth-for-amnesty commissions, and a hybrid of these.

A central factor in the transitional justice debate is the importance of balancing the need for 'restorative justice' with solemn principles pointing to criminal trials and 'retributive justice'. In the former, the focus is beyond simply ensuring formal accountability for wrongs; the focus is on the vindication of the victim, not the punishment of

perpetrators (Biggar 2001). Restorative justice approaches (van der Spuy *et al* 2007) also emphasise a need to focus on 'bottom-up' processes founded in ordinary people's experiences and concerned with taking steps that they feel would set things right. This is to be contrasted with processes involving only some elites – whether peacemakers, truth commissioners, prosecutors, or indicted persons (Braithwaite 2002).

A restorative justice approach does not, however, discount the value and effectiveness of criminal punishment, including as a means of affirming the dignity of victims and preventing vengeance. Trials in criminal courts in transitional settings cannot easily be dismissed as merely backward-looking: they may be essential to ensuring a sense of 'justice', avoiding self-help measures, and to deterring future abuses (Jeong 2005:165,168).

In considering general matters of approach, there are certainly real-world tensions between pursuing both 'peace' and 'justice' (Biggar 2001; Nesiiah 2005). In some cases the price of peace is accepting that justice might need to be stayed against important stakeholders (Grono & O'Brien 2008), although some aggrieved parties will simply not be able to contemplate peace without justice being seen to be done. However, it is necessary to move beyond polarised debates presenting these two ideals as incompatible objectives: this obscures efforts to consider the potential for approaching these issues in a more integrated mutually reinforcing way (Simpson

2008), and can be an abdication of the duty to seek imaginative, tailored solutions. To simply place prosecutorial justice and the attainment of peace 'into opposed, abstract categories' comes at the expense of 'an informed analysis of where tensions do, and do not, exist on the ground' (Sachs 2008:i).

Before considering truth commissions as a possible vehicle for transitional justice in Zimbabwe, it is necessary to bear in mind that what is possible by way of institutionalised response – how robust and intrusive and prosecutorial it might be, for example – is heavily dependent on the balance of political power at the time of the transitional agreement (ICG May 2008; Bass 2000; Shea 2000). The background of a truth commission 'is invariably [a result of] stalemate in a political power play' (Tomuschat 2001:235). Criminal prosecutions might be too provocative given the residual power in elements of the previous incumbent regime (who may be part of a transitional government).

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Strategies of reconciliation are affected by political constraints since imposing justice can have a disruptive potential so that it may be crucial 'not to provoke still-powerful elements in the armed forces that retain political veto power during a fragile democratic transition...the parameters of publicly acknowledged truth can be deepened as the peace increasingly proves its resilience' (Jeong 2005: 155,185). For example, in South Africa's transition, the white minority controlled the police and military and so wielded serious negotiating power; in Chile and Argentina the enduring influence of the military leadership meant that it was unthinkable to commence criminal actions against the main culprits. In Solomon Islands, by contrast, the preference was to strengthen courts and pursue prosecutions, leaving reconciliation mechanisms to informal, church-based and community processes. Talk of a formal truth commission and amnesties was thought to send mixed messages about future responsibility for ethnic violence. But this choice of strategy was possible because of the high degree of political control and a regional military stabilisation force.

Discussions on the specifics of any comprehensive formal truth and justice response in Zimbabwe probably needs to wait until some form of legitimate transition is underway and sufficiently consolidated. However, the broad shape of any future justice mechanisms and process is something that will determine – and be determined by – present political machinations.

### **A Zimbabwean truth commission: Why?**

The term 'truth commission' encompasses a broad range of possible features and purposes. Such institutions are normally ad hoc, official (state authorised or sponsored), temporary non-judicial fact finding bodies with a limited mandate. They are victim focussed and investigate or receive information on a pattern of human rights abuses over a certain or determinate period of time. They normally produce a report with recommendations for reparation and redress and for prevention of future abuses (Hayner 2002:14; UNSG 2004:50; Freeman 2006). Since 1974 numerous truth commissions have been established by states – with or without the assistance, encouragement or say-so of international actors – either to support ongoing peace processes or promote democratic progress in post-conflict societies.<sup>2</sup>

There is no unique formula or prescription for implementing effective transitional justice: a truth commission is only one option and ought not to be

resorted to automatically as part of a conflict resolution 'first aid kit' (Shaw 2005). Before addressing what features a future truth, justice and reconciliation commission (TRC)<sup>3</sup> might adopt, it is worth debating the considerations for and against such a mechanism for Zimbabwe.

### ***The case against a TRC: moving on, leaving the past alone***

Suggestions for a formalised TRC process assume that it is not sufficient to simply leave the past unresolved. However, a deliberate decision not to pursue any formalised process is also one possible option for Zimbabwe. Some have argued that one ought to generally 'curb the enthusiasm' about truth commissions (Mendlehoff 2004).

For one thing, it is necessary to attempt to 'centre peacebuilding efforts in the will of the people' (Daglish & Nasu 2007): it is quite possible that the overwhelming view in society might be that the past ought simply to be left alone. Some societies such as Spain after General Franco simply drew a 'thick line' between past and present and moved on, apparently successfully, without any particular structural mechanisms for reconciling with the past (Chesterman 2004:154; Jeong 2005: 163). Shaw challenges the purportedly universal benefits of verbally remembering violence, arguing that 'social forgetting' may be an equally valid strategy. Shaw's research in Sierra Leone revealed that despite pressure from NGOs and human rights activists

for a truth commission, most ordinary people – who were tired, afraid and too well acquainted with 'the truth' of the violence – appeared to prefer a 'forgive and forget' approach.

There are other problems too. A TRC could squander precious time, money and (if handled poorly) perhaps a once-only opportunity. Depending on its timing and tone and the prevailing political balance, a truth commission (and the process of designing it) could actually create a new venue of dispute and itself become a source or focus of renewed conflict, fragmentation and disintegration in the way that a constitution-making process in transitional societies can sometimes do (Murphy 2003). A TRC could be used as a political tool to disproportionately allocate blame to one side; it could threaten or antagonise powerful influential persons upon whose cooperation a fragile national unity depends. It could partly redeem and legitimise the previous regime by enabling its representational portrayal in an ordered institutional process (Wilson 2001a).

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Some see the notion of reconciliation as already compromised in Zimbabwe. Archbishop Pius Ncube has said that cycles of abuse and impunity in Zimbabwe are 'cancerous' so that there is a need to avoid amnesties and simply prosecute persons in future, including to educate future generations (Iliff 2004). Just two years ago the Zimbabwe Human Rights NGO Forum's report expressed an opinion that Zimbabweans are 'cynical' about reconciliation or that the concept has been 'widely devalued, perhaps irrevocably' and 'remains polluted as a result of its expedient political manipulation and its failure to deliver meaningful results' (Zimbabwe Human Rights NGO Forum 2006:7,21; Zimbabwe IDEA 2003:34).

A further problem is that there is a tendency to concentrate on internal political factors shaping any peace institution, reflecting assumptions that truth commissions result from and reflect local demands. However, this overlooks the significance of external political concerns, demands or expectations which may be crucial in shaping the choice or form of institution (Parker 2008:5). There is a need to be careful that 'transitional justice options' and institutional models (such as a TRC) are not selected for reasons that have more to do with appeasing international expectations (Parker 2008:37) or following rule of law 'prescriptions' (Dezalay & Garth 2002:326; Klug 2002) than what is really needed – and wanted – on the ground. Truth commissions are not an end in themselves, to be pursued formulaically and regardless of the circumstances (Emmanuel 2007:13). Some argue that it ought to be established whether such an exercise has popular support among ordinary persons (not just local or international NGOs or other elites) (Shaw 2005:12).

South Africa's experience has been hugely influential and generated an enormous amount of literature.<sup>4</sup> But foreign experts or donors in particular may not see that South Africa's experience is not necessarily apposite to Zimbabwe's very different history. Certainly, no model of TRC can be simply transposed directly from one situation to another (Sarkin 1999:802). 'Reconciliation' in particular is something that needs to be defined within a specific historical and cultural context (Jeong 2005:184).

There is the risk that such institutions are foreign models 'lost in translation' or are cosmetic only, giving a false sense of resolution: while a great deal of any TRC process is understood as symbolism and ritual, to fulfil their function new institutions dealing with common experiences need to reach and be

reached by the grassroots level (Davis 2004:145). World Bank studies on institutional designs (World Bank 2002) note unsurprisingly that 'supplying' institutions is not enough: people must want to use them. These experiences suggest that a TRC would be meaningless without a concerted (and expensive) public engagement and education programme, which with other priorities, may not be viable in the near future.

Thus where there is a relatively high level of awareness about the state's responsibility for abuses (accompanied by power balancing issues, the need to avoid creating new sites of friction, general fatigue, fairly widespread communal implication in violence, legal complications from past pardons and amnesties, and resource shortages), it is at least arguable that Zimbabweans may legitimately indulge in deliberate 'social forgetting.' Victor de Waal's (1990:45) characterisation of Zimbabwe's first decade after 1980 is that the society as a whole decided to simply move on, at least in relation to the Rhodesian era, leaving the past behind.

Most experience in other societies, however, points the other way, especially where there are concerns about who gets to decide what is 'forgotten.' In any event, this passive form of response to Rhodesian-era abuses left many legacies still affecting Zimbabwe today, including a prevailing culture of impunity.<sup>5</sup> Even if it could be proven empirically that most Zimbabweans were 'cynical' about reconciliation, this does not

preclude a TRC. Instead, it depends on the actual form and practice of any such institution, the possible positive community response to any visible international sponsorship of a process (rather than more 'government business'), and the prevailing political situation at the time.

### ***The case for a TRC: addressing the past for the future's sake***

A number of general factors commend the establishment of a truth, justice and reconciliation commission as an element of a comprehensive approach to transitional justice. While there is probably no 'right to truth' in international law (Parker 2008), one principled issue suggesting some formal justice mechanism is the well established international legal duty on the Zimbabwean state (whichever regime is then its custodian) to not only refrain from violations but more positively to afford remedy and reparation to victims of human rights abuse, including through at least attempting investigations.<sup>6</sup>

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The ordinary criminal courts in any country that has experienced oppressive rule are likely to be severely weakened if not entirely compromised. There may be such a degree of complicity by members of society generally that it is impossible to conceive of attempting to prosecute all possible offenders. In any event, mere prosecutions, even if politically possible, do not necessarily achieve reconciliation or reduce tension (du Plessis 2002). By their nature, trials moreover 'paint an incomplete picture of the past' (Bosire 2006:4) or even distort history (Simpson 1997).

The most obvious objective of a TRC is that through an official truth body, an accurate record of the country's past will be established, uncertain events will be clarified, victims will be assured of recognition, and the silence and denial regarding human rights violations will be dealt with (Hayner 2002:25; Pouligny 2002). Such processes can achieve a measure of symbolic closure through memory (Hamber 2002; CSVR 2005) enabling a corrected history more on one's own terms (Naidu & Adonis 2007), and an institutionalisation of the memories of the abusive time (for therapeutic as well as principled reasons) (Carroll & Pasco 2002). Part of the point of the process is to reach an institutionalised common memory (Christie 2000) or national consensus on how the past is to be remembered and represented (Jeong 2005:158). This is in contrast to denial and deliberate or non-deliberate forgetting.

The 2008 MDC policy on justice is that 'the right to know' extends from victims to the rest of society 'to become a collective right. This is meant to ensure that violations are recorded in history so as to prevent their recurrence' (MDC 2008:1,36-37). For many victims no new 'truth' will emerge, but formal acknowledgment of their truth can be vital in individual and group healing, forestalling division, and enabling peacebuilding (du Toit 2000). However, as Jeong has rightly pointed out, knowing 'the truth' of what took place is a necessary condition for forgiveness, but not a sufficient condition of reconciliation and peace (Jeong 2005:165; de Grief 2007).

In addition to its truth-seeking function, such a commission can be a platform for a range of processes, aimed at both addressing matters of principle and ensuring grievances do not undermine the prospects for sustainable peace. Such commissions can become the focal point for efforts going beyond the establishment of truth – efforts at reparation – by which is meant not merely financial or other economic or in-kind compensation, but

broader notions of restitution, rehabilitation, satisfactions and guarantees of non-repetition (Hamber & Mofokeng 2000; Hayner 2002; Buford & van der Merwe 2004).

Victims' needs are individual and communal, structural and psychological (Hamber 2001; Long & Breeke 2003). Truth commissions allow a forum for forgiveness to be given, and for formal recognition of victims, so helping them reclaim their dignity. Perpetrators are afforded a formal mechanism to renounce their violent deeds and to rejoin society in some fashion. 'Reconciliation' may mean many things – but is essentially about the (re)-building of civic trust (Bosire 2006:27) and shared commitment to certain normative values, including by putting some past differences aside.

There is already arguably this consensus on fundamental moral norms in Zimbabwe, even if they have been breached for some time (Bhargava 2000). A TRC can set the parameters of possible political action during the transition and serve to 'civilise' and channel the energies and tensions in a way that can reduce the potential for violence (Klug 2000:5). It can describe institutional responsibility for human rights abuses and propose specific reforms. The work of institutions such as truth commissions can thus be cathartic and promote reconciliation, lifting the lid on human rights abuses, ending denial that might persist in certain sectors of the community, creating visible distance from the abusive era and enabling forward movement. It can also help to focus on the wider patterns and move

away from attempting individual guilt where this is paralysing peace.

There are also some more specific factors particularly commending a TRC for Zimbabwe (and which suggest that these issues need to be at the forefront of negotiation now, even if a TRC is only established later). In our view the following factors in particular suggest a possible need for a formal mechanism such as a truth commission in Zimbabwe:

- The consistency and level of state intimidation and brutality
- The use of legislative instruments to sanction state violence
- The politicisation of the judiciary and the prosecution service
- The partly covert nature of both direct state abuses and indirect state-instigated action
- The large number of low level perpetrators especially among the youth militias

### Formal acknowledgment of truth can be vital in individual and group healing and for enabling peacebuilding



- Secrecy and denial on the part of the regime
- A culture of impunity reinforced by pardons and general amnesties over many years
- The lack of remedial and redress options

### ***Moves toward a TRC and current MDC justice policy***

In this context, there have been a number of calls for any transition in Zimbabwe to be marked by a TRC process as one component of a comprehensive approach. The Zimbabwe Human Rights NGO Forum's 2006 study of transitional justice options appears to lean in favour of a trials strategy, opining that 'there is considerable support in many quarters for perpetrators of gross human rights violations to be brought to trial' (Zimbabwe Human Rights NGO Forum 2006:11).

Nevertheless, and while discussions about a transitional justice mechanism including a TRC have been largely confined to a small group of local NGOs and lawyers, the idea of a TRC has featured consistently in debate in Zimbabwe since at least August 2003, when over 70 civil society organisations met in Johannesburg. That symposium expressed preference for a 'Truth, Justice and Reconciliation Com-mission' as the main mechanism for redress, while not discounting the possibility of prosecutions.

The symposium declaration condemned the pattern of amnesties and culture of impunity and expressed the view that gross violations should never be the subject of an amnesty; it noted that victims of all past human rights abuses have a right to redress and to be consulted about the nature of mechanisms what will be established to address their needs. The declaration also called on civil society and churches to have a role in the formation of such mechanisms. The symposium drew on an earlier event, and has been followed by a number of initiatives and networks attending to the needs of victims including torture victims, recording reports and allegations, instituting civil actions against the state, and considering future justice options.<sup>7</sup>

The 2001-2 draft alternative Zimbabwean constitution of the unofficial National Constitutional Assembly had provided in its Chapter 9 for a 'Truth, Justice, Reconciliation and Conflict Prevention Commission.' The proposed institution would sit for five years (renewable). It would be responsible for investigations of past violations, provision of remedies, the promotion of reconciliation, and conflict prevention. Further details were left to a future non-constitutional instrument.

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On the government's part, there have obviously been no official signposts about future transitional justice. In March 2006, Cabinet approved plans for a 'Human Rights Commission' to 'counter the large scale orchestration of alleged violations' and the 'falsification, exaggeration, orchestration, and stage-managing of human rights violations by detractors.' The announcement was widely treated with derision.

The opposition Movement for Democratic Change (MDC) has in the past received generic advice on transitional justice options.<sup>8</sup> The MDC has consistently followed a fairly conciliatory (but often ambiguous) line on future justice issues. Since at least its 2003 Congress the MDC has mentioned the intention to establish a truth commission. At that time, the position adopted was that 'general provisions of amnesty for prisoners will continue' although the party would nevertheless 'ensure that due legal process is applied to all human rights abuses' (MDC 2003). In its latest (2008) policy statement the MDC says it will 'make a clean break with that past and establish a strong human rights culture' but that it 'will be necessary to deal with all past abuses.' It proposes a 'Truth and Justice Commission' to hear, in public formal recorded sessions, 'the stories of the victims and to identify those responsible for human rights abuses and any associated criminal acts', as well as mechanisms to prevent future abuses and 're-orientation programmes for all those affected' (MDC 2008: 36-7).

The MDC's formal justice approach is said to be based on four principles: the communal right to know, the right to justice and a remedy, the right to reparations, and the 'right' to non-recurrence. It purports to deal with all episodes of political violence in Zimbabwe since 1980. It states that the MDC is committed to 'dealing with the needs of the victims' of all post-1980 abuses 'in a holistic and comprehensive way' by giving 'those affected by the abuse of their rights the satisfaction of knowing that the truth about what happened has been revealed and that the culprits have been brought to justice in some way.' If anything, it is suggestive of a preference for criminal trials: 'all victims will have an opportunity to assert their rights and receive fair and effective remedy, ensuring that the perpetrators stand trial and that the victims obtain reparations ... [this reflects] an obligation on the State to investigate, prosecute and punish the guilty' (MDC 2008:1,36-7).

The proposed mandate of the commission includes 'to determine who was responsible for the incidents



being considered, and to decide whether or not to recommend further investigations by an appropriate authority and possible prosecution.’ The current policy does not set out a policy on past (existing) amnesties given by the Mugabe regime, and mentions the possibility of future amnesties only in the negative and obliquely, offering little firm assurance to perpetrators: ‘in the event that those identified as being responsible...do not themselves, on a voluntary basis, offer to come before the Commission to tell their side of the story, the Commission may, at its discretion, [direct the matter for investigation for possible prosecution]’ (MDC 2008:37). The MDC policy appears to attempt – perhaps wisely – to structurally distance justice measures from the vexed issue of property losses, land seizures and land reform. The policy does not, however, mention a role for the international community in any justice process.

In any event, this policy is of course subject to whatever political realities exist after June 2008. Whatever their policy, the MDC is faced with a hostile and nervous (albeit susceptible to multi-level fracturing) security apparatus, and has already made overtures to reassure in particular the security leadership and to guarantee their ‘security’ (ICG May 2008:4). It is not clear whether this pledge consists of an undertaking to engineer a formal amnesty from any prosecution, or something more political by way of a guarantee not to pursue legal actions. As a result of the 2008 election stalemate and violence, the leader of the main MDC faction, Morgan Tsvangirai, told the BBC that while he had long espoused the notion that Mugabe himself ought to be allowed to retire with dignity rather than face prosecution, that issue might need to be revisited given the events following the elections in March 2008.<sup>9</sup> With the caveat that all policies and predictions are subject to changes in the political situation, it is helpful to now consider how any Zimbabwean truth commission might be constituted in the future.

### **A Zimbabwean truth commission: How?**

How past injustices will be dealt with by a one-off formal national process will largely be determined by the actual nature of any political transition in Zimbabwe. Moreover, every country situation is unique and, as already noted, caution needs to be adopted in assessing comparative experience and foreign institutional models. Nevertheless there are many lessons to be learned from other experiences (Hayner 1994; IDEA 2003; OHCHR 2005, 2006; Amnesty 2007; ICTJ 2008). In this section we consider broadly, and by some comparison with others’ experience, the issues and factors that might need attention in a transitional justice mechanism for Zimbabwe.<sup>10</sup>

### ***Process of design and need***

The process leading to the decision to establish a TRC can be significant: whether people need, are involved in and know about a TRC will partly determine whether it is legitimate, accepted and effective as the primary formal vehicle for resolving past issues (Ford 2004). For this reason there is an argument for delaying any justice mechanism while the public is informed and reassured, so that it is not cosmetic: there is no point establishing a wonderful new institution if nobody knows about it or uses it. As well as a media campaign, local NGOs should have a formal part to play in the process of establishing any commission, in particular in raising public awareness of the institution (ICTJ 2004).

### ***International involvement?***

The influence of international support or even pressure need not condemn a TRC (Kumar 1997; MacPherson 2001). True, there are limits to what outside peacemakers can achieve (Braithwaite 2002:187). However, highly visible international sponsorship may greatly assist a Zimbabwean TRC’s credibility, profile, and perceived independence (as well as its funding and skills-base). International civil society organisations may also play an important role.

### ***Independence, membership and staffing***

Any commission must have clear operational independence of government, including in the interpretation of its written mandate, in developing its procedures, and in its report and recommendations (Hayner 1994:179). Strategies from ‘rule of law’ support to fragile judiciaries may be relevant. A strong external sponsor such as the United Nations (UN) or African Union (AU) and donors can, through conditionality and other controls or ‘hybrid’ structures with expatriate impartial staff, help ensure operational and publicly perceived independence.

The legitimacy and effectiveness of any commission depends significantly on the stature, credibility and ability of its senior members (Sarkin 1999:804; Hayner 2002:215). It is not out of the question to include political party actors, as Chile did, provided there is an acceptable balance. In Chile, Argentina, and South Africa all commissioners were nationals. It is unlikely that the El Salvadoran option of having only foreign commissioners would be acceptable or indeed proper in Zimbabwe. On balance, the mixed model of both national and international staff works well in terms of both substance (skills) and form (local confidence) (Dickinson 2003). There is no shortage of highly experienced and credible commissioners and retired judges or diplomats



from, especially, other African countries who might be significant assets.

In South Africa (Sarkin 1996:621; Boraine 2000:71) and Rwanda (Sarkin 1999:807), commissioners enjoyed enhanced credibility partly as a result of the publicised process of appointment and civil society consultation. It might be suggested that the AU and UN Secretaries-General or their delegate, the transitional President, the Head of the Zimbabwe Council of Churches, political party representatives, and leading local NGOs could each nominate members of a selection panel for commissioners, who ought not only be lawyers. The institution will of course also need local and foreign experts: social workers or psychologists, IT specialists, data entry staff, logistical coordinators, interpreters and security personnel (Hayner 2002:217).

### **Resources and funding**

A secure stream of funding is vital to operations and is also directly related to capacity for independence. Financially under-resourced truth commissions (such as in Uganda and Ecuador) have failed, while the Guatemalan commissioners spent the bulk of their time raising funds to keep the organisation running (Tomuschat 2001:248). There are many examples of commissions receiving external funding (Hayner 2002:224) and in any event this will be imperative in Zimbabwe.

A TRC may have indirect financial consequences: recommendations on legal reforms, human rights training, prosecutions, symbolic monuments, or communal reparation in the form of development projects. However, the funding question becomes more complicated if it is envisaged that there be direct monetary compensation for some victims. There are practical concerns about limited resources and payment scheme integrity in a weak governance scenario. There are also issues of principle: to what extent is monetary compensation appropriate, especially in cases of widespread victimisation? There are real needs victims may have for specific treatment or redress, but introducing monetary compensation could perhaps distort the process.

The South African TRC was empowered to make smaller urgent interim payments to victims (or families) in need, as well as larger grants. In Zimbabwe, public compensation schemes such as the War Victims Compensation Act have in the past been heavily subject to abuse and looting (Buford & van der Merwe 2004), although some will still have legitimate claims there. A 1997 report on the 1980's

*gukurahundi* violence expressed the view that individual compensation in Zimbabwe was not a feasible option. The report had recommended that if compensation was not possible, a form of communal reparation (by targeted development or communal reparation) should be pursued, and proposed a Reconciliation ('Uxolelwano') Trust for this purpose (Catholic Commission 1997).

The best strategy might be to empower any commission to make recommendations as to individual needs or development services for particular communities but to leave the actual provision of these services to professional, church, or community organisations or government departments and donors. The 2008 MDC policy notes that 'reparations' involves both individual and collective measures: 'victims, relatives and dependents must have an effective remedy.' The right to reparation 'must cover all injuries suffered by the victims' including 'restitution (seeking to restore victims to their previous state)', 'compensation (for physical or mental injury, including lost opportunities, physical damage, defamation and legal-aid costs)', and 'rehabilitation (medical care, including psychological and psychiatric treatment and counselling)'. The policy envisages a truth commission determining 'the personal losses incurred by these incidents', and making 'recommendations to the State agencies involved for compensation and any direct assistance that might be adjudged necessary and justified' (MDC 2008:37).

In Zimbabwe, public compensation schemes have in the past been heavily subject to abuse and looting

The policy proposes a separate set of 'special compensation courts' to which the Truth and Justice Commission may direct cases for 'establishment of the degree and value of any financial prejudice' in which case 'the victims may claim compensation from the State...restricted to the cost of any medical procedures...necessitated by the abuse at the time, any consequential costs, and any future prejudice arising from the abuse.' Where 'physical disability or the death of a breadwinner' has been incurred, the truth commission 'will direct the courts for a compensation assessment' (MDC 2008:38). The idea is that the special courts also make awards possibly including also 'the value of...any fixed assets' lost as a consequence of the abuse, payments to be 'strictly controlled' and directed only to replacing lost property assets (homes).

Such special courts would also deal with farmers deprived of their land in relation to restitution of the title deeds of the property and payment 'to be used only to restore the productive capacity of the



property in question' (MDC 2008:38). This policy to institutionally separate and distance property losses and land restitution issues from enquiries into political violence is understandable and prudent, although it will prove difficult to separate some abuses from their context of property invasions or displacement events.

### ***Form of mandate***

Commissions have been established in various ways: by presidential decree (Argentina, Chile, Haiti, Sri Lanka, Chad, Uganda), by peace accord (El Salvador, Guatemala), and as statutory bodies (South Africa) (Hayner 2002). The written mandate may be restricted, reflecting political compromises in the transition negotiations. Too narrow a mandate results in overlooking the majority of human rights violations (Uruguay: Hayner 2002:72), although the mandates of the Guatemalan (Tomuschat 2001:239) and Nigerian (Hayner 2002:69) commissions were so broad as to effectively swamp them in labour disputes and other unrelated claims. A Zimbabwean commission's mandate should allow investigation into all forms of serious rights abuses, leaving it to the commission to decide what is most pressing and appropriate (Hayner 1994:636). One issue in Zimbabwe will be to not ignore human rights abuses associated with land invasions and displacement, but without dragging the commission into the politics of land redistribution as they then stand.

### ***Timing: when to start***

Experience shows that commissions that begin work while the early political momentum and international attention is there fare better. The 2008 MDC policy states the intention to set up a commission within three months. South Africa's process was very thorough and consultative, with the design phase taking 18 months. While legal issues need to be ironed out, a quicker start may be opted for especially if the window period of political, public and donor support is most open. A TRC can also have the secondary effect of holding off pressure for other measures of accountability, giving time for adequate planning (Hayner 2002:221).

### ***Timing: duration of mandate***

The majority of truth commissions have had a limited period of time to complete their work (between six months and a year). South Africa's TRC took five years in total. There are good efficiency and budgetary reasons for a short duration, which also ensures the report is published while there is still relevant buy-in to the peacebuilding process. The 1986 Ugandan commission demonstrates the

dangers of no time limit: by the time it wound up nine years later, it had lost the support and interest of the public, and failed to produce the cathartic effect expected (Hayner 2002:222). On the other hand (which relates also to how quickly it begins operating), it will take time for people to learn about, trust and engage with such an institution.

Reconciliation is a long term process. There is also the tension at the heart of transitional justice: to what extent does one dwell on the past while rebuilding for the future? If public awareness-raising is possible before and during its work, and given funding availability and avoiding 'Uganda syndrome', any Zimbabwean commission might run for two years, or be a permanent body but with a gradually narrowing mandate that looks later at previous periods in history in more abstraction.

### ***Timing: what counts as the past?***

Which period of history is to be officially covered? This is likely to be a problematic issue. While practicality and limited funds suggest that the primary focus ought to be post-2000 political violence, there will be various groups for whom the present is not explicable without a process that engages with the period 1980-2000, before that with Rhodesia 1965-1979, and indeed going back to European settlement in 1890. The 2003 civil society symposium suggested dividing a TRC mandate into a 'pre-1960' (colonial) era and 'post-1960' era. It is preferable perhaps that a mandate might be devised that preoccupies the commission with the post-2000 state violence, but which endeavours at a later date (when the new order has consolidated) to uncover some of the unknown facts of Zimbabwe's often violent past.

However, any future transitional justice strategy might not attempt to formally address war crimes and abuses committed on all sides during the Rhodesian civil war leading to Zimbabwe's 1980 independence (or colonial-era abuses before 1965), for these reasons: the lapse of time; the fact that the era ended in a largely effective peace and political reconciliation process; a succession of legally unchallenged amnesties between 1975 and 1980; the fact that Rhodesia-era abuses cannot easily be attributed to the state run by the ZANU-PF regime; and the practical need to limit and focus any future commission's mandate, budget and workload. A future truth commission might need to address how the colonial and Rhodesian eras created a culture of human rights abuse, impunity and oppressive legislative schemes. However, it should only seek to do so in general terms, and incidentally to its primary mandate to deal with political violence after 2000.

As noted, what will be more difficult to decide is whether any commission ought to attempt to deal with allegations of grave crimes and human rights abuses allegedly committed mainly in Matabeleland and Midlands provinces in the 1980s (in particular the *gukurahundi* period in 1983-4). This period saw direct state violence against the civilian population pursuant to a state of emergency against 'dissident elements': mass killings, disappearances, murder, group beatings, rape, destruction of property, intimidation, detentions, and torture. It is thought that up to 20 000 people may have died as a direct result of the operations, while many more suffered serious human rights abuses.

Those with command responsibility for these crimes are known. There has been no official or formal communal action. Findings of the official January 1984 Chihambakwe Commission inquiry into Matabeleland were never published.<sup>11</sup> Until the independent report *Breaking the Silence, Building True Peace* (Catholic Commission 1997; ZHRA 1999), the story of the 1983-4 period remained almost entirely unspoken and unheard in Zimbabwe. No official comment on the report was ever received. As part of the Unity Accord signed on 22 December 1987, a general amnesty was granted on 18 April 1988, extended in June 1988 to members of the security services. In 1996 the government undertook to compensate victims of the 1983-4 operations. No compensation scheme has ever been implemented.

The 1997 report suggests that there remain serious matters to be unearthed and resolved in Zimbabwe. There has been no redress for victims, whether formal apology or explanation, or by way of reparation. It may be arguable that the stories and issues of the Matabeleland chapter are best left until such time as greater political stability exists and any democratic order is consolidated. Whatever the possibilities of trials for some primary actors, a truth commission in relation to the 2000s could be designed so that it turns, upon completion of its mandate, to deal with the events of the 1980s at a somewhat greater level of abstraction and generality.

### **Procedures**

Every commission faces difficult questions of methodology regarding how it will conduct investigations and hearings, gather evidence, prioritise cases, establish due process rules and procedures, how it will relate to the press and

public, and so on. In Latin American cases, most commission activities were closed-door, whereas in South Africa all proceedings were public and covered nationally. This is preferable: it increases public appreciation and prevents continued denial by sectors of society. Public hearings shift the focus from a mere *product* (a report), to the *process* itself. Victims must have a central role.

The process also has significance for perpetrators: this is a forum for their rehabilitation, contrition, moral reconstitution and, like victims, the recovery of their own humanity (Jeong 2005:156). It prevents dangerously alienating those with an already violent past. Victims can be dissuaded from acts of revenge and self-help by seeing the perpetrator's regret. Defining 'victims' and 'perpetrators' is not likely to be simple: is the focus on those tortured by the regime, or can merely displaced persons come forward? Some perpetrators may be from the opposition.

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A TRC should make counselling services available to testifying victims (Amoah & Greenbaum 2005). Community organisations, traditional healers, church structures, extended families and friends, and support groups may need to fill the breach. There are a number of excellent and dedicated Zimbabwean and South African organisations that could assist. One thorny issue will be whether any Zimbabwean commission undertakes its own investigations rather than a passive approach (testimony and records). The El Salvador body – given only nine months' mandate – chose to

select paradigmatic cases as examples of typical patterns of abuse over the historical period. The South African attempt was more thorough than such a typology.

### **Parallel informal processes**

Other community level processes need to run in parallel to any formal commission, which is hampered as it needs to establish public trust and awareness in quite a short time, whereas local, women's and church groups have long been familiar to the community (and are likely to still be operating long after a TRC has wrapped up). Formal quasi-judicial mechanisms are not likely to be sufficient to reconstruct the moral order: a multi-level approach is required, addressing needs on a number of levels (Kiss 2000). The commission's report cannot purport to be the 'end' of efforts at reconciliation, counselling, and other processes (Kayser 2001). Other cultural and artistic media might be explored as vehicles for the same process.

## **Products: report and recommendations**

The focus of a commission should be its process, but interim and/or final reports can be very significant. The report needs to be made public, and publicly digestible, and attempt a degree of 'closure.' The Argentinian report on the fate of 9 000 'disappeared' political activists and students became a bestseller there, partly satisfying public calls for 'justice'. There are obvious illiteracy and accessibility issues that need to be considered, including the use of radio and other media.

Objective truth may be a difficult concept and likely to be contested, but there is an inherent element of symbolism involved in TRCs and the final report is a formal attempt at capturing broadly 'the truth' – an overall acknowledgment of the abuses that occurred. A useful incidental function (but which can be the greatest legacy of truth commissions: Mani 2002:102), can be forward-looking recommendations aimed at the laws, practices and conditions that enabled abuse to be unchecked and unremedied for so long: reforms might include changes in procedures for appointing judges, or human rights training for the military and police.<sup>12</sup> The dilemma of having a strongly independent TRC is that it will be seen as not part of government and perhaps result in a diluted sense of the accountability of *the state* itself. It is through attribution of responsibility and specific positive recommendations that a TRC can hold state institutions directly accountable.

## **The question of amnesty and pardons**

Any Zimbabwean commission ought to be given power to grant conditional amnesty from prosecution according to fixed criteria, albeit avoiding blanket amnesties and not precluding criminal prosecutions. Any commission would need to confront the difficult political and legal issues of past amnesties and pardons given at various periods in post-independence Zimbabwe. Amnesty from prosecution is often, as in South Africa's TRC, the main incentive for revealing the truth.<sup>13</sup> It is a legitimate option in transitional societies (van Zyl 2000), and may be a political necessity. Considered waiver of punishment can also be a powerful signal of the authority of a new dispensation (Teitel 2000:56).

The power to afford immunity from criminal prosecution for a cooperative and forthcoming individual sets up something of a tension between the restorative justice ideals and retributive justice principles (McGregor 2001:37; Wilson 2001b:542).

However, international practice of conditional and/or limited amnesties shows that these imperatives can be reconciled. Truth commissions have today come to be seen as *complementary* to prosecutions (Lerche 2000). Provided incentive structures are in place and criteria are clear, where amnesty is not considered appropriate, there is no reason why prosecutors should not pursue the matter as a criminal offence.

Of the more recent commissions, the South African TRC and Timor-Leste commissions have been accorded the power to grant amnesty. The Timorese model is of particular interest for Zimbabwe: individuals were entitled to apply for amnesty by making full disclosure where their acts were associated 'with the political conflicts of East Timor.' Immunity was limited to less serious offences, and dependent on a visible act of remorse that serves the interests of the people affected (Stahn 2001: 963), such as community service, reparation, a public apology, or other acts of contrition. Care must be taken to afford the perpetrator some dignity and redemption – it may be dangerous to institutionalise humiliation.

Any Zimbabwean commission ought to be given power to grant conditional amnesty according to fixed criteria

This public process facilitates community reintegration of low level perpetrators and would be most apposite to 'youth militia' or 'Border Gezi' militia in Zimbabwe, many of whom have been very young at the time of their misdeeds, or may have acted out of fear or undue influence. Moreover, given their numbers and age they can hardly all be prosecuted and

are likely to be in need of serious rehabilitation and diversion into constructive ends. A public apology and a form of community service could be envisaged.<sup>14</sup>

A new Zimbabwe government will aim to appease international opinion.<sup>15</sup> The South African TRC opened itself to possible criticism (Dugard 1997) for allowing amnesty for international crimes. In this context there is an unresolved legal question over whether only some amnesties (or indeed commissions)<sup>16</sup> 'count' – that is, would be recognised internationally. The quality of the procedure and the context might mean that subsequent international prosecution is precluded (if not legally, at least politically) where full disclosure is given for politically motivated acts and where the TRC is part of a legitimate democratically elected system (Dugard 2002:700; Mani 2002:112). International deference is likely to be given to any such process, as that society is itself best placed to decide what is conducive for national reconciliation.<sup>17</sup>

Although the Preamble of the Rome Statute of the International Criminal Court (ICC) declares that 'it is the duty of every State to exercise criminal jurisdiction over those responsible for international crimes,' it is arguably still open to states to grant amnesty for international crimes without violating a rule of international law, although there is a growing legal consensus that no purported amnesty for certain international crimes (such as genocide or torture) would be legally valid (Dugard 2002:697-99; UNSG 2004:[21]; Jeong 2005: 169). If an eventual Zimbabwean commission had UN support, for instance, it would be difficult to contemplate it formally approving amnesty for international crimes.

Establishing a rule of law precedent early is important. Retaining the aura and integrity of international prohibitions is also valuable. However, the focus should be on what works for Zimbabweans overall; what avoids catastrophic conflict. If legitimate Zimbabwean authorities decided not to proceed against persons possibly responsible for crimes against humanity (by amnesty or simply non-prosecution), this would not be a first: it is regrettable but true (Hayner 2002:90) that the pursuit of international justice has long been a selective and irregular process (Simpson 1997). The ideal in practice would be an independent and credible prosecution service, perhaps with international elements, with an exceptional but temporary power of wide discretion about initiating prosecutions.

### ***The relevance and role of international justice and the ICC***

It is relevant to briefly address whether international or foreign criminal tribunals might in any way overlap with any Zimbabwean commission's mandate or amnesties it might offer (Schabas 2003). Since at least 2003, a number of actors including the International Bar Association have called for the ICC to examine the Zimbabwe situation.<sup>18</sup> The August 2003 Zimbabwe civil society symposium's Declaration appeared to support the use of ICC mechanisms by any new government. In their most recent report, the ICG suggests that if the current regime (with or without Robert Mugabe) retains power by illegitimate means, a Security Council commission of inquiry ought to be established to investigate reports of torture and human rights violations and 'to recommend appropriate accountability mechanisms, perhaps including referral to international legal authorities [the ICC]' (ICG May 2008:2).

The ICC has limited jurisdiction, however (see generally Kaul 2002; Kirsch & Robinson 2002). It can investigate and hear only the most serious crimes of concern to the international community,<sup>19</sup> committed after July 2002. Zimbabwe is not presently a party to the ICC Statute. It is not open to another State Party to refer abuses by Zimbabwean nationals of other Zimbabweans inside that country to the Court. The Prosecutor moreover has no power on his own accord to initiate an investigation. Even if Zimbabwe was in the near future to accept the Court's jurisdiction over specific crimes for the period that it was not a party to the Statute,<sup>20</sup> the ICC would only have limited (2002 onwards) jurisdiction. A final possible source of ICC jurisdiction is the UN Security Council's power to refer country situations to the Court. Political consensus would be required, and care taken over precedent setting: unless the situation in Zimbabwe were to deteriorate significantly, it is somewhat unlikely that the ICC will receive a Security Council referral on this matter.

### **The ICC scheme is simply one element in a continuum of possible options**

Technical issues aside, there are other concerns about the appropriateness of an international prosecution strategy here. ICC action might represent 'select trials of demonised individuals that exonerate the collective': selective prosecution can send the signal that whoever is not charged is innocent (Braithwaite 2002:204). An ICC investigation might undermine local peace efforts, while also purporting to be the single comprehensive treatment of the problem, leaving many matters unresolved: stories untold, hurts

unhealed, deeds unaccounted for. The ICC scheme is simply one element in a continuum of possible options. Certainly at this present stage, the prospect of an ICC dimension ought to be flagged to senior elements – but so as to induce cooperation now, not in such manner as to frighten these still powerful actors into bunkering down. If no legitimate transition arrangement is reached, whether 'escalating' the matter then by Security Council referral to the ICC will actually help with engagement is still highly debatable.

Perhaps more likely than ICC involvement in transitional justice in Zimbabwe is the prospect of prosecutions, before foreign national courts applying international law, of Zimbabwean offenders for crimes in Zimbabwe, where these persons come within the territorial jurisdiction of such foreign courts. Nothing would require a foreign court to recognise any amnesty granted by any Zimbabwean institution (Dugard 2002:699). For example, in May 2008 the names of 18 Zimbabwean officials accused of authorising or committing torture were forwarded



to South African prosecutors, who could proceed under South African law should the accused be found in South Africa. The possibility of national level prosecution (and certainly any ongoing or completed prosecutions at the time) ought to be factored into considerations of 'transitional justice' options and might impact on a future commission's work.<sup>21</sup>

Provided we do not see mere deals between elites – or even perhaps if we do – the international community might need to drop calls for high profile prosecutions and learn to live with any local political compromise that works for all Zimbabweans themselves. As Chesterman (2004: 156) has said, '[a] central problem is that commentators with an international perspective often view such internal transitions through the lens of international criminal law: either the wrongdoers are held accountable, or they enjoy impunity'. It is however possible to have a more nuanced, practicable – and just – approach.

## Conclusion

Where will Zimbabweans place themselves in relation to the politics and principle of justice issues in the current interim phase – and who gets to decide for Zimbabweans on these issues? Once some legitimate transition is in place, what is the correct balance between forward momentum and adequate pause on past injustices?

If a legitimate transition is accomplished in Zimbabwe, the 'singularity' of truth commissions (Iliff 2004) – one-off, limited purpose and lifespan institutions carrying a 'never again' message – commends them as a highly visible and powerful mechanism to break with past troubles. The past is comprehensively and publically examined not so much for its own sake, as for the sake of the future society. South Africans understand that deep wounds sometimes need to be cleaned and aired, not simply bound up and forgotten: out of sight is not out of collective mind (du Plessis & Ford 2008).<sup>22</sup> One must 'bury the hatchet, not the past' (McCaughey 2001). At the same time, the focus ought not to be blindly on 'a truth commission' or its forms, but on what process and strategy best secures justice, reconciliation and repair in society. Moreover, formal processes such as truth commissions can catalyse but are only one part of wider social processes: these channels need to be further encouraged and enabled.

The prospect of a truth commission is not something to be postponed while 'politics' runs its course: what

it offers by way of compromise can assist, now, in ensuring a legitimate transition is possible. Of course, any choices about the features of a Zimbabwean commission will necessarily reflect the political compromises and stresses that accompany a transition from autocracy to democracy. There needs to be a more public participatory dimension to the justice debate now, to the extent that this is possible: one risk is that political actors might by consensus opportunistically 'drop' the issue of transitional justice as 'too hard' (Iliff 2004). On the other hand, it is naive to deny that formal justice mechanisms require some stability: there still may need to be some privileging of 'peace' over 'justice' in the way those involved in negotiations choose to deal with past abuses. In appropriate circumstances this 'compromise on justice' should be understood as itself being a morally valid and defensible choice, not simply a pragmatic (unprincipled) one (Gutmann & Thompson 2000:23).

The prospect of a truth commission is not something to be postponed while 'politics' runs its course

The abduction, torture and murder in May this year of people like Gibson Nyandoro and Tonderai Ndima (to name just two opposition supporters)<sup>23</sup> – the effect on families, the mystery surrounding the perpetrators or their superiors – properly situates policy debate about transitional justice options in Zimbabwe. Discussions of such transitions are often attended by a high degree of optimism and idealism about the possibility of clearing a place in society 'where truth, justice, mercy and peace [can] meet' (Lederach 1997). This can obscure how very difficult it is in practice to reconcile various considerations (political influences, community expectations, resources, time, security, etc). However, it is possible to translate such ideals into particular institutional and procedural manifestations in order to address identified problems that left unresolved can engulf a new society – or prevent its emergence at all.

## Notes

- 1 See for example 'Justice in Zimbabwe' (Legal Resources Foundation, Harare, 2002); *Playing with Fire* (Zimbabwe Institute, 2004); 'Resolution on the Situation of Human Rights in Zimbabwe' African Commission on Human and People's Rights, Banjul, 5 December 2005; monthly and annual reports of the Zimbabwe Human Rights NGO Forum [www.hrforumzim.com](http://www.hrforumzim.com); shadow reports and other reports of the Human Rights Trust of Southern Africa [www.sahrit.org](http://www.sahrit.org); 'Policing the State' (November 2006, with Solidarity Peace Trust) and the 'Zimbabwe Monitor' both of the Institute for Justice and Reconciliation

- (Cape Town) [www.ijr.org.za/transitionaljustice/zimbabwe-monitor](http://www.ijr.org.za/transitionaljustice/zimbabwe-monitor); Human Rights Watch world reports and occasional reports on Zimbabwe [www.hrw.org/africa/zimbabwe.php](http://www.hrw.org/africa/zimbabwe.php), including the influential June 2003 HRW Report 'Under the Shadow: civil and political rights in Zimbabwe' and most recent May 2008 report; annual and occasional country reports of Amnesty International [www.amnesty.org/en/region/africa/southern-africa/zimbabwe](http://www.amnesty.org/en/region/africa/southern-africa/zimbabwe); US State Department, Country Reports (Human Rights), 2000 – present [www.state.gov/drl/rls/hrrpt/](http://www.state.gov/drl/rls/hrrpt/); United Kingdom Government (Foreign & Commonwealth Office), Human Rights Report (2002 – 2007).
- 2 Perhaps the best-known of the more than 30 commissions since the 1980s (Hayner 2002; Parker 2008: appendix) are the commissions established in Chile, Argentina, El Salvador, Guatemala, South Africa, and Timor-Leste.
  - 3 The acronym 'TRC' has become synonymous with the South African Truth and Reconciliation Commission. We use it as a general term: as is quite evident from this paper, there are limits to the utility of comparative models.
  - 4 This literature is not canvassed here: some of it is critical, for example Wilson 2001b. For a recent ISS publication on the TRC legacy, see Emmanuel 2007 and the bibliography therein.
  - 5 The MDC's 2008 policy on a future TRC expresses the view that 'the demons that were the product of [the pre-1980] era have come back to haunt the nation. The perpetrators of those violations of human rights were never brought to book, and the victims were obliged to live with the memory of those events without any sense of justice or recompense' [MDC 2008:36].
  - 6 See Article 2 of the 1966 International Covenant on Civil and Political Rights; the duty is now clearly established, but beyond this paper's scope: see the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (UN Commission on Human Rights, E/CN.4/Sub.2/1993/8; E/CN.4/1997/104).
  - 7 The earlier event was the Amani Trust 'Truth and Justice Conference' 2001. Amani has an established pedigree and reputation among organisations devoted primarily to rehabilitation and counseling for victims of war and later political violence in Rhodesia and Zimbabwe. Since the 1990s, a number of local NGOs working on reconciliation have set up an informal 'Umthwakazi Reconciliation Group' or network. Members included Amani Trust, Legal Resources Foundation, Imbovane, Zimrights, Zimbabwe Project Trust, World Vision, Zimbabwe Lawyers for Human Rights, Transparency International. The Zimbabwe Catholic Bishops Conference also formed a task committee on reconciliation and justice options. The 'Zimbabwe Civic & Education Trust' has planned for 'Peace Committees' across Zimbabwe including options for community education about transitional justice options, while various church groups have processes of their own. Zimbabwe Lawyers for Human Rights has been developing a transitional justice project, towards capacity building of its members (to prepare lawyers for the challenges ahead in transitional justice) through working visits to countries that have gone through transition. After the working visits, the trainees will be used as resource persons to train ZLHR members and other NGO members. Databases on political violence, torture and other abuse have been compiled by organisations such as Redress, Zimbabwe Doctors for Human Rights, the IDASA Advocacy Unit, the Centre for the Study of Violence and Reconciliation (Witwatersrand University), the 'Accountability Commission for Zimbabwe' and so on. A large number of civil claims have been lodged against the state for human rights abuses, especially after 2003 and mainly with the assistance of Zimbabwe Lawyers for Human Rights and the Legal Resources Foundation.
  - 8 For example, general advice received from International Centre for Transitional Justice in 2001-2002.
  - 9 BBC News 'Hardtalk' interview, 18 April 2008. In May 2008, however, Tsvangirai was again speaking in terms of the need for a 'graceful and dignified exit' for President Mugabe. This again illustrates the fluid nature of transitional justice process design and the inherency of political realities.
  - 10 We do not consider international criminal tribunals such as Rwanda's or Sierra Leone's since at present the seriousness and nature of abuses in Zimbabwe do not suggest this level of intervention would be appropriate.
  - 11 It was announced in November 1985 that the findings of the report would not be released; in 2004 the Supreme Court dismissed an application for the State to be compelled to release the report: *Zimbabwe Lawyers for Human Rights v President of Zimbabwe & Anor*. S-12-03; Civ. App. 311/99.
  - 12 Under its principle of non-recurrence, the MDC's 2008 policy already includes the measures of 'disbanding militias and other armed groups' and 'repealing all emergency laws, abolishing emergency courts, and recognition of the inviolability and non-derogability of habeas corpus.'
  - 13 See *Azapo v President of the Republic of South Africa* 1996 (4) SA 671, 681-685 (Mohamad CJ).
  - 14 Since 1992 Zimbabwe has had in place a legal mechanism in place for 'community service' as an alternative to prison. This presupposes a criminal conviction, but foreseeably an amendment to the Criminal Procedure and Evidence Act could establish a form of incentivised and supported – even partly remunerated – community service pursuant to an amnesty and apology before the truth commission. In an environment of high unemployment and the need for reconstruction and development, such a programme could prove popular and effective with youth militia members, channelling energies into reconstruction while being a form of debt payment to the community for violent conduct under the Mugabe regime. This reconciliation and rehabilitation procedure could be used to good effect to deal with certain less serious acts directed against persons and property in respect of land invasions in recent years.
  - 15 The MDC 2008 strategy notes the intention to comply with international justice prescriptions: '[n]othing can be gained by condoning violations of international law in our domestic law: victims will go above Zimbabwe's law and courts to international tribunals' (MDC 2008:1).
  - 16 Parker (2008) has recently expressed the view that an emerging international norm in relation to truth commissions can be discerned whereby commissions are required to display certain characteristics to be 'valid' (internationally acceptable) institutions. The

implication is that Zimbabweans would be constrained in their choice of forms.

- 17 *AZAPO v President of the Republic of South Africa* (1996) 4 SA 671, [31] (constitutionality of the TRC amnesties).
- 18 Mark Ellis, International Bar Association, 7 March 2003 (IBA Press Release); see also *Legalbrief Africa*, 7 March 2003. There is a clear jurisdictional problem, as we note.
- 19 Genocide, crimes against humanity, and war crimes, defined in the Statute. Other issues aside, it would be a jurisdictional threshold question whether these levels and kinds of violence were perpetrated by certain individuals in Zimbabwe.
- 20 The question might then arise whether any amnesties given to date would constitute a bar to ICC prosecution. The Rome Statute is silent on amnesty (Dugard 2000, 2002; Majzub 2002): national amnesties in Zimbabwe would not *per se* prevent prosecution before the ICC, but Article 53(2)(c) of the Rome Statute allows the Prosecutor to refuse prosecution where, after investigation, he concludes that 'a prosecution is not in the interests of justice, taking into account all the circumstances'.
- 21 Action filed by the Southern African Litigation Centre: *Legalbrief Africa*, Issue 279, 5 May 2008, pursuant to the Implementation of the Rome Statute of the International Criminal Court Act (Act 27 of 2002, South Africa). The jurisdiction of a South African court will be triggered when a person commits an ICC crime outside South Africa but is later present in the territory of the Republic. An attempt to utilise the Act against President Mugabe was made in September 2002 while Mugabe was attending the World Conference on Sustainable Development in Johannesburg. However, President Mugabe had left South Africa by the time the call for his arrest was made. In January 2004 an attempt was made to obtain an order from a magistrates' court in London against President Mugabe on torture charges. In 2003, efforts were made to bring an action against Zimbabwean leaders in Canada under that country's Crimes Against Humanity and War Crimes Act. See also 'torture as tort' action brought before the US Federal District Court for the Southern District of New York: *Tachiona v Mugabe* (2001) 169 F.Supp.2d 259.
- 22 Archbishop Desmond Tutu referred consistently to the imagery of opening, cleansing and balming wounds throughout South Africa's TRC process.
- 23 Nyandoro was a 53-year old liberation war veteran and long-time ruling ZANU-PF supporter, abducted on 2 May by unknown men before onlookers and later apparently tortured and beaten to death, this about a month after his decision to publicly declare support for the opposition MDC: Tracy McVeigh, *Guardian Weekly* 23 May 2008, 3; the severely mutilated body of Ndima, youth activist, MDC member and outreach worker, was found some days after he was taken forcibly from his home by armed unknown men: *BBC News* (online) 25 May 2008.

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## About this paper

A major issue in any possible transition in Zimbabwe is how to deal with those responsible for and affected by past and recent political violence and human rights abuses. 'Justice issues' are not simply matters to be dealt with at some later stage. They are themselves 'political issues' affecting the current stalemate. A form of national truth, justice and reconciliation commission may be one option. There is no one conflict resolution 'first aid kit': truth commission strategies are not unproblematic. Moreover, what is possible is heavily dependent on the balance of political power at the time of any transition. However, various general and Zimbabwe-specific factors commend such a body and accompanying strategy. The compromise it would represent can assist now in ensuring a legitimate transition is possible (by giving reassurances and incentives to cooperate in peacebuilding); it can also assist in future in the actual process of establishing facts and dealing with perpetrators and victims of past violence.

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